

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 10-14731-scc  
Chapter 11  
2626 BROADWAY, LLC, .  
Debtor. .  
. . . . .  
2626 BROADWAY, LLC, . Case No. 10-04086-scc  
ADVERSARY PROCEEDING  
Plaintiff, .  
vs. .  
One Bowling Green  
BROADWAY METRO ASSOCIATES, . New York, New York 10004  
L.P., et al., .  
Defendants. . Wednesday, December 15, 2010  
10:32 a.m.  
. . . . .

TRANSCRIPT OF STATUS CONFERENCE AND MOTION TO REMAND (IN  
ADVERSARY PROCEEDING) BEFORE THE HONORABLE SHELLEY C. CHAPMAN  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Broadway Metro M. Teresa Daley Law Offices, PC  
Associates, L.P. By M. Teresa Daley, Esq.  
By Andrea J. Lawrence, Esq.  
520 8th Avenue, 24th Floor  
New York, New York 10018  
(212) 560-3943  
For the Debtor, 2626 Robinson Brog Leinwand Green  
Broadway, LLC Genovese & Gluck, P.C.  
By Robert M. Sasloff, Esq.  
875 Third Avenue  
New York, New York 10022  
(212) 586-4050  
For Reavis Parent Lehrer, Maria M. Patterson, Esq.  
counsel to Albert Bialek, 360 Riverside Drive, #12-C  
and others New York, New York 10025  
(212) 316-0205

1 Audio Operator: Michelle Brown  
2 Transcription Service: Esquire  
3 One Penn Plaza, Suite 4715  
4 New York, New York 10119  
5 (212) 687-8010  
6 Transcription Service: Esquire  
7 One Penn Plaza  
8 Suite 4715  
9 New York, N.Y. 10119  
10 (212) 687-8010  
11 Proceedings recorded by electronic sound recording;  
12 transcript produced by transcription service.  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 (Time Noted: 10:33 a.m.)

2 THE COURT: Good morning.

3 MR. SASLOFF: Good morning, Your Honor. Robert  
4 Sasloff from the firm of Robinson Brog, we're counsel to the  
5 Debtor.

6 MS. PATTERSON: Maria Patterson, Special Counsel  
7 to Reavis Parent & Lehrer, counsel for Metro Associates.

8 THE COURT: Give me your name again? I'm sorry.

9 MS. PATTERSON: Maria Patterson.

10 THE COURT: Okay.

11 MS. PATTERSON: Special Counsel for Reavis Parent  
12 Lehrer, counsel to Albert Bialek and non-member associates.

13 THE COURT: Okay.

14 MS. DALEY: M. Teresa Daley, M. Teresa Daley Law  
15 Offices, P.C., counsel for Broadway Metro. Good morning.

16 THE COURT: Good morning.

17 MS. LAWRENCE: Andrea Lawrence, M. Teresa Daley  
18 Law Offices, as well, on behalf of Broadway Metro.

19 THE COURT: Good morning. Is your partner here?  
20 I thought I saw him.

21 MR. SASLOFF: He was here on another matter, Your  
22 Honor.

23 THE COURT: Okay.

24 MR. SASLOFF: So, I'm here today alone.

25 THE COURT: All right. Today seems to be a day

1 devoted to property.

2 MR. SASLOFF: That's true, Your Honor. In this  
3 case, there are three matters on today's calendar.

4 THE COURT: Yes.

5 MR. SASLOFF: One was the status conference --

6 THE COURT: Right.

7 MR. SASLOFF: -- one was a pre-trial conference,  
8 and an action that we removed, and the other is counsel's  
9 motion to remand --

10 THE COURT: Motion to remand.

11 MR. SASLOFF: -- that action back to the State  
12 Court. I don't know how you want to handle the calendar. If  
13 you want, we could do the remand --

14 THE COURT: Well, why don't you tell me the  
15 status, and then I'll tell you what I'm thinking.

16 MR. SASLOFF: As Your Honor recalls, this was a  
17 Debtor that leased property and was supposed to renovate that  
18 property and turn it into something different.

19 THE COURT: Right.

20 MR. SASLOFF: There have been motions before you  
21 with regard to the landlord's motions for relief from stay  
22 and alternative relief. Last time we were here, Your Honor,  
23 after some time there was an order entered by this Court  
24 granting the landlord relief from the automatic stay so they  
25 could go back to State Court to seek the issuance of the

1 warrant of eviction, I believe, in this case.

2 THE COURT: Right, so what's the status of that?  
3 Maybe Ms. Daley is a better person to ask that. So, you can  
4 finish your presentation.

5 MR. SASLOFF: I was told they have applied for it,  
6 but they have not gotten it as of yet.

7 THE COURT: Okay.

8 MR. SASLOFF: That being said, the Debtor in  
9 accordance with that order has stopped marketing the  
10 property, has taken down his signs and essentially what is  
11 left over would be the Debtor's claims against third parties  
12 which we believe that the Debtor was allowed to pursue and  
13 would form the basis of some sort of, I guess, a plan trust  
14 or liquidating litigation trust that the Debtor would use to  
15 pay back its creditors.

16 So, in that regard we removed one action from the  
17 State Court which was the action against the landlord with  
18 regard to the tortious interference with its contract to put  
19 in a sub-lessee at the location. Otherwise, the Debtor is  
20 not obligated --

21 THE COURT: This is your client who told me  
22 through you that he wanted his State Court rights. So,  
23 having said that, he now takes an action that was well on its  
24 way in the State Court and removes it here. It's a little  
25 inconsistent.

1 MR. SASLOFF: Respectfully, Your Honor, I  
2 disagree. There are different kinds of State Court rights.  
3 The State Court rights that we were here talking about last  
4 time were with regard to the lease itself, the underlying  
5 lease between the Debtor and landlord. This action is a  
6 damage claim essentially. It's a claim against the landlord  
7 for getting in the way of that contract which would have  
8 provided this Debtor with income --

9 THE COURT: Right, a claim that's fully based on  
10 State Court -- on State law that has nothing to do with  
11 bankruptcy.

12 MR. SASLOFF: Well, it had nothing to do with the  
13 bankruptcy in its main cause of action, but it is the  
14 centerpiece for, at this point, the only part of the  
15 reorganization case at all and the case isn't far along. All  
16 that has happened in that case so far --

17 THE COURT: All that has happened in this case is  
18 that your client is not paying rent. Your client's still not  
19 paying rent.

20 MR. SASLOFF: Your Honor, yes, and that was as a  
21 consequence of not paying rent which is why this Court  
22 granted relief from the automatic stay.

23 THE COURT: And that's it. Your client gets to  
24 stay in the property and not pay rent indefinitely? Is that  
25 your client's position?

1 MR. SASLOFF: No, Your Honor, the relief from stay  
2 would allow the landlord to seek possession of the property  
3 which is what they're doing.

4 THE COURT: So, that's the meaning of 365(d)(3) is  
5 it says that you have to pay rent, but if you don't, you get  
6 to rent the courthouse here and you get to stay here as long  
7 as you want without there being any consequences.

8 MR. SASLOFF: No, that's not what we believe the  
9 statute says. What the statute says is if we don't pay rent,  
10 there are consequences. The consequences for not paying rent  
11 before this Court was this Court granting relief from the  
12 automatic stay.

13 THE COURT: That's it though. That's it.

14 MR. SASLOFF: That's all they were asking for.  
15 They asked for relief under 362, not under 365. So, as a  
16 consequence of the relief they sought, they got what they  
17 asked for. You know, if they had made a motion under some  
18 other form of relief, then this Court would have done maybe  
19 something pursuant to that motion. But the motion they made  
20 was for relief from the automatic stay and they said to the  
21 Court that additional grounds for relief, other than the fact  
22 that they believe the lease had been terminated pre-Petition  
23 was "we're not paying rent."

24 And we acknowledge that to this Court which is why  
25 we consented to and why this Court ordered the Debtor -- that

1 the stay would be modified so that the landlord could go back  
2 to State Court and do whatever it's necessary to do to take  
3 possession of this property and we're not interfering in that  
4 process in any manner.

5 THE COURT: All right, but there was an  
6 interesting statement in the papers that you filed. I asked  
7 for further briefing on the question of my authority to order  
8 the surrender of the premises and this is the submission that  
9 your firm made on November 19th, paragraph 9. You say,  
10 "There was only one instance in Section 365 of the Bankruptcy  
11 Code where the trustee shall immediate surrender -- your typo  
12 -- its leased premises in addition to having the lease be  
13 deemed rejected."

14 And when I asked Mr. Leinwand what the effect of a  
15 failure to comply with 365(d)(3) was he said it's a deemed  
16 rejection. That was what his answer was.

17 MR. SASLOFF: The 120 days hasn't expired yet,  
18 Your Honor. So, you don't have a deemed rejection until the  
19 expiration --

20 THE COURT: No, it says that -- this sentence  
21 says: "There is only one instance in Section 365 where the  
22 trustee gets immediate surrender in addition to having the  
23 lease be deemed rejected." And that other instance is  
24 (d)(4).

25 MR. SASLOFF: Which is the expiration of 120 days.

1 THE COURT: I understand. Read what the words  
2 say, "...in addition to having the lease be deemed rejected."  
3 He told me that the lease is deemed -- that the consequence  
4 of not paying rent under (d)(3) is a deemed rejection.

5 MR. SASLOFF: I do not believe he said as a  
6 consequence of not paying rent it's a deemed rejection.

7 THE COURT: I asked him what the consequence of  
8 failure to pay rent was and he said the rent -- the lease is  
9 deemed rejected.

10 MR. SASLOFF: Your Honor --

11 THE COURT: We can get the transcript.

12 MR. SASLOFF: I don't believe that's what Mr.  
13 Leinwand said, but I certainly believe that that's not what  
14 the statute says, nor do the cases actually say that. So, if  
15 Mr. Leinwand may have made that statement, that's not what  
16 the cases hold or the statute says.

17 The meaning of the statute says that at the  
18 expiration of -- there's two contrary --

19 THE COURT: I know what (d)(3) says and (d)(4)  
20 says. So, what are you going to do under -- are you going to  
21 make a motion?

22 MR. SASLOFF: To extend, Your Honor? I don't  
23 believe we were going to, Your Honor.

24 THE COURT: Because your position is that?

25 MR. SASLOFF: Well, considering the stay is lifted

1 and the landlord is going for a warrant of eviction, I'm not  
2 in the business necessarily of running up unnecessary fees  
3 for a client where I'm going to be making a motion that I do  
4 not believe this Court would even grant and consider.

5 And what the statute then provides if the lease is  
6 deemed rejected, then the Debtor would be directed to  
7 surrender the premises. If the Debtor doesn't, then the  
8 landlord -- and I represent a lot of landlords, Your Honor, a  
9 landlord has two choices. It comes back to this Court and  
10 says give me relief from stay so I can go get my State Court  
11 enforcement procedures. I'll use the normal procedures to  
12 get a warrant. Or, if this Court is so inclined, could issue  
13 an order and have the U.S. Marshals evict the Debtor.

14 I don't know if this Court -- in this climate, I  
15 haven't seen any of the Bankruptcy Judges as of late issue  
16 any orders directing the U.S. Marshal, but the consequence of  
17 --

18 THE COURT: I issued one two days ago. I just  
19 have a very strong feeling that your client has no respect  
20 for this Court and has no respect for the process, and the  
21 fact that they sought to remove what I'll call a mature State  
22 action to this Court. I understand you're telling me that  
23 there's a nexus to the reorganization, but that fact is  
24 consistent with a pattern of behavior that indicates that  
25 they're going to attempt to drag this out, not pay rent as

1 long as they can and --

2 MR. SASLOFF: Your Honor, I respectfully again  
3 disagree. I think that you have an inaccurate view of this  
4 Debtor. We explained to the Debtor the consequences --

5 THE COURT: I have a very accurate view in my mind  
6 of your client sitting in that chair with a smirk on his  
7 face. That's my view.

8 MR. SASLOFF: I can't control his smirk. I know  
9 what he says to us. I know what we say to him. We advised  
10 him of what his obligations to this Court were. We advised  
11 him of what his responsibilities as a Debtor-in-possession is  
12 because a financial decision whether or not to make  
13 conditional capital contribution of \$100,000 to keep a lease  
14 when this Court was inclined to, we believe, grant relief  
15 from the automatic stay and it was a business decision that  
16 he chose not to fund the rent and he understood the  
17 consequence was is what was going to allow the landlord to do  
18 what was appropriate to get back possession. I mean, we're  
19 not standing in the way of that.

20 THE COURT: So, if the warrant issues, is the case  
21 then over?

22 MR. SASLOFF: That part of the case is potentially  
23 over, Your Honor.

24 THE COURT: And then what's left of the case?

25 MR. SASLOFF: We still believe that there are

1 three valid appeals; one of which may resurrect the lease if  
2 the Debtor was successful in prosecuting it. I don't -- my  
3 office wouldn't be the party representing --

4 THE COURT: Right, but if the landlord evicts your  
5 client, then --

6 MR. SASLOFF: I would have to allow the appellate  
7 counsel to deal with whether that --

8 THE COURT: I see.

9 MR. SASLOFF: -- the appeals, but that would be an  
10 issue they would have to deal with.

11 THE COURT: Okay, all right.

12 MR. SASLOFF: It's not something I would deal  
13 with. But there are other aspects of this case including  
14 these claims against third parties that we do not necessarily  
15 believe are contingent on the lease being in effect one way  
16 or the other. So that --

17 THE COURT: What other assets are there?

18 MR. SASLOFF: There are -- there is --

19 THE COURT: Just the claims.

20 MR. SASLOFF: There's this claim against the  
21 landlord. There's also another complaint that the Debtor is  
22 pursuing outside the bankruptcy with regard to a malpractice  
23 claim.

24 THE COURT: But my question is what's the -- if  
25 the lease goes, what's the reorganization? There's nothing

1 to reorganize around. You came here and said that you wanted  
2 to reorganize around the lease.

3 MR. SASLOFF: A liquidating plan is a  
4 reorganization, Your Honor. If we were to do a liquidating  
5 trust with a litigation trust in it and we were to collect  
6 what we believe would be damages in excess of \$20 million,  
7 that's more than enough to pay all the creditors a hundred  
8 cent dollars.

9 THE COURT: What creditors are there besides the  
10 landlord?

11 MR. SASLOFF: There are all the parties that --

12 THE COURT: All right, those were just -- but I  
13 remember there was an issue about that. Some of them were  
14 affiliates --

15 MR. SASLOFF: There are six creditors that are  
16 affiliates or insiders, but then there are another, I think,  
17 14 creditors.

18 THE COURT: Weren't those just law firms, not just  
19 law firms.

20 MR. SASLOFF: There's law firms, there's  
21 engineers, there are people that did the construction work.

22 THE COURT: Okay.

23 MR. SASLOFF: There are other people -- there are  
24 other people that lent money to the Debtor because when the  
25 Debtor didn't have money to pay whatever rent it did pay

1 initially and to come up with the deposit because it had  
2 given a security deposit to landlord in excess of a million  
3 dollars or around a million dollars, those parties are all  
4 listed as creditors in this case.

5 THE COURT: Okay, all right, so what's your  
6 proposal for what happens in the next 45 days of this case?

7 MR. SASLOFF: If Your Honor was to keep this  
8 litigation, we would agree to expedite whatever was necessary  
9 to bring this case to the next stage. If Your Honor remands  
10 the case, I don't know if it's necessary to keep the  
11 reorganization. You know, we could keep it pending seeing  
12 what the outcome of those litigations are and I don't know if  
13 I'd necessarily recommend to the Debtor that he keep it  
14 because he would incur additional court fees and other costs  
15 if there is nothing in this Court.

16 The stay wouldn't necessarily have any benefit any  
17 longer for him. The reason why we thought it was more  
18 appropriate to bring that action here is because we could  
19 expedite it. This Court would probably do that action faster  
20 than the Supreme Court would.

21 Absent that action, actually that case, there  
22 isn't much left for this Debtor.

23 THE COURT: Okay. All right. Thank you. All  
24 right, Ms. Daley or Ms. Patterson or Ms. Lawrence?

25 MS. DALEY: Your Honor, we're here on behalf of

1 Broadway --

2 THE COURT: Ms. Daley, do you want to come up or  
3 pull the microphone over to you.

4 MS. DALEY: I'm sorry, Judge. Is that better?  
5 First of all, we still haven't gotten any decent occupancy  
6 rent even though this Court had issued an order directing its  
7 payment. When we were last here and the Court granted some  
8 of our application, there was other portions of the  
9 application which were held in abeyance.

10 Two of them were the issue with regard to whether  
11 or not the Court had the power or authority to issue an  
12 immediate order directing their removal from the building  
13 and/or directing the U.S. Marshal to remove them and deliver  
14 possession back to the landlord. And then, the other part of  
15 it was with regard to the bad faith filing that that portion  
16 of the application and the hearing were left in abeyance and  
17 it was adjourned without a date.

18 Counsel just mentioned their claims against third  
19 parties. He mentioned a list of creditors, et cetera,  
20 however, part of the bad faith application also involves his  
21 submitting to this Court a list of so-called creditors that  
22 didn't have claims, and pretty much he made up creditors and  
23 a lot of the entities that he listed were entities in which  
24 the principal of the Debtor is also involved in.

25 So, we had submitted, I believe it was a letter

1 memo that was submitted --

2 THE COURT: Yes.

3 MS. DALEY: -- and we never got a date back on --  
4 if we were going to have a hearing on the bad faith and also  
5 on that issue of this Court directing the removal. Now, when  
6 the Court signed the last order vacating the stay to the  
7 extent of permitting us to go back to the State Civil Court  
8 of the City of New York and County of New York, we did that.

9 The Clerk of the Court has informed us since that  
10 day and we've been bothering them pretty much every week,  
11 that they are backed up and we're not going to wind up with a  
12 warrant for a while, and without the warrant, we can't do  
13 anything. So, they still have possession of the building.

14 In the meantime --

15 THE COURT: Did they give you a time frame?

16 MS. DALEY: They say that they're backed up three  
17 weeks, but the truth is now with the holiday season --

18 THE COURT: Right.

19 MS. DALEY: -- in front of us, even if the warrant  
20 were to be miraculously issued today or tomorrow, the  
21 Marshals in the City of New York go on moratorium the last  
22 two weeks of the year --

23 THE COURT: Right.

24 MS. DALEY: -- so there won't be any eviction. We  
25 don't anticipate a warrant being issued probably until the

1 beginning of next year at some point.

2 THE COURT: Okay.

3 MS. DALEY: And in the meantime, they continue to  
4 be in possession.

5 THE COURT: But you have the keys and you have  
6 access?

7 MS. DALEY: We have keys and we have access, but  
8 we can't do anything other than --

9 THE COURT: I gave you permission to --

10 MS. DALEY: Do repairs and stuff, correct, but we  
11 can't engage in any sort of negotiations to try to lease the  
12 premises because we don't --

13 THE COURT: But apropos of this being the holiday  
14 season, I think to be blunt, I mean, not much is going to  
15 happen in the next two weeks.

16 MS. DALEY: It's understandable. I think though  
17 earlier in the Court's exchange with counsel for Debtor,  
18 there was a mention of the assumption or reduction in the  
19 lease.

20 THE COURT: Yes.

21 MS. DALEY: But that assumption or reduction of  
22 the lease would presume --

23 THE COURT: There is a lease.

24 MS. DALEY: -- there was a lease in effect.

25 THE COURT: I understand.

1 MS. DALEY: And our position from day one has been  
2 that that lease --

3 THE COURT: Yes.

4 MS. DALEY: -- is terminated in accordance with  
5 the terms of the lease. Nothing's been done to revive it so  
6 this Court can't revive it, so --

7 THE COURT: Right, but where I was going with that  
8 was there's kind of this interesting little spot that we're  
9 in where because of the position that the Debtor's taken that  
10 the lease -- that they still have an interest in the lease  
11 and that it wasn't properly terminated, nonetheless, I think  
12 I'm hearing there's not going to be any motion under (d)(4).

13 So they are -- it's been positioned so that the  
14 action that the Debtor claims would be required for me to  
15 order a surrender, they're not going to do. So, their  
16 position is that I'm stuck.

17 MS. DALEY: Except for the fact as part of our  
18 original motion papers that issue was addressed as to whether  
19 or not this was, in effect, property of the estate --

20 THE COURT: Right.

21 MS. DALEY: -- whether or not it had terminated  
22 prior to the filing of the bankruptcy.

23 THE COURT: Right.

24 MS. DALEY: Now, that issue that was submitted in  
25 our original application to the Court has yet to be decided.

1 THE COURT: Right, but I think we're a little bit  
2 chasing our tails because I think it's the Debtor's position  
3 that even if all of that's true, you've been given your  
4 remedy which is relief from the stay, whether you call it not  
5 property of the estate or failure to pay rent, your remedy is  
6 relief from the automatic stay and you have that. So, the  
7 only question I think is whether or not we wait a reasonable  
8 time for the warrant to issue, or whether I enter an  
9 immediate order for the surrender of the premises.

10 I think that you submitted authority and I've done  
11 some research on my own that indicates that I do have that  
12 authority. I'd rather not exercise it, to be frank, right  
13 now. I mean, if you were to come back and tell me that the  
14 warrant was not going to issue for three months, that might  
15 cause me to come to a different conclusion.

16 MS. DALEY: Well, if I may interject, Your Honor?

17 THE COURT: Sure.

18 MS. DALEY: Once the warrant is issued --

19 THE COURT: Yes.

20 MS. DALEY: -- there's a process that needs to be  
21 followed and that means that a notice of intention to evict  
22 needs to be served upon the Debtor. Once that happens, the  
23 Debtor or tenant respondent in the State Court proceeding  
24 then has no opportunity to go back to either the court that  
25 entered the judgment or to the appellate court and make an

1 application in order to stay the eviction for whatever  
2 reasons including their ability to perfect an appeal, which  
3 was also part of this Court's order when the stay was  
4 vacated, challenging the judgment.

5 We don't anticipate that the Debtor is just going  
6 to lay down and do nothing. So, we do not anticipate either  
7 getting an eviction at some time at least a month away or we  
8 do anticipate having other impediments thrown into our path.

9 THE COURT: All right, tell me about the --

10 MS. DALEY: For that reason --

11 THE COURT: Okay, I hear you. Tell me about the  
12 status of the -- your view of the status of the litigation  
13 that's the subject of the removal.

14 MS. DALEY: What I'm going to do is I'm going to  
15 turn that over to Ms. Patterson --

16 THE COURT: Very well.

17 MS. DALEY: -- so that she can best address that.

18 THE COURT: All right, thank you.

19 MS. DALEY: Thank you, Your Honor.

20 MS. PATTERSON: Would you like me to come to the  
21 podium?

22 THE COURT: Sure.

23 MS. PATTERSON: Your Honor, again, Maria  
24 Patterson. I'm representing Broadway Metro Associates, the  
25 landlord, as well as Albert Bialek who is a defendant in the

1 action, and I was authorized to file the papers on behalf of  
2 the two other defendants in the action, Howard Siegel, P.C.  
3 and Mr. Siegel individually. He is Mr. Bialek and the  
4 landlord's attorney.

5 Your Honor, the status of the State Court action  
6 is that it was pending before Justice Yates --

7 THE COURT: When was it filed?

8 MS. PATTERSON: It was filed in April of last year  
9 -- of this year, rather.

10 THE COURT: Okay.

11 MS. PATTERSON: And I can't remember the precise  
12 date in April.

13 THE COURT: Okay.

14 MS. PATTERSON: And Justice Yates -- it had  
15 progressed to an oral argument on a motion to dismiss, or two  
16 motions to dismiss that were filed by the defendants. Judge  
17 Justice Yates heard oral argument and frankly, as I read the  
18 transcript -- I was not there, my colleague, Ms. Jump,  
19 handled the argument -- he seemed ready to act.

20 However, the Debtor's counsel in that proceeding  
21 pled for the opportunity to file a memorandum of law  
22 addressing the substance of the motion to dismiss.

23 THE COURT: Pled, and by that you mean they had  
24 failed to file anything and then asked for dispensation?

25 MS. PATTERSON: Correct. What they had filed was

1 an opposition on technical grounds saying that the motions to  
2 dismiss had not been properly filed because a memorandum had  
3 not been submitted with them in quite the proper way.

4 THE COURT: Okay.

5 MS. PATTERSON: So, they had filed in opposition,  
6 but it really didn't go to the substance of the motions. So,  
7 at the oral argument --

8 THE COURT: Mr. Sasloff, this is not your firm in  
9 the State Court?

10 MR. SASLOFF: No, Your Honor.

11 THE COURT: Okay.

12 MS. PATTERSON: No, no, it's a different counsel.

13 THE COURT: Okay.

14 MS. PATTERSON: So, counsel, you know, prevailed  
15 upon the court to allow him time to file a brief addressed to  
16 the substance. He was supposed to do that within a period of  
17 time, ten days I believe it was. He did not do so. In fact,  
18 Ms. Jump was ready to make a motion for a default and then  
19 this bankruptcy was filed.

20 So, we think had it not been for this bankruptcy  
21 having been filed and a notice having gone from the Debtor to  
22 Justice Yates, that we would have gotten a default and he  
23 would have been ready to issue his decision.

24 Incidentally, Your Honor, I am embarrassed to say  
25 that I realized in reviewing my brief that I had neglected to

1 put in my cases on the stay. I do have those cases if Your  
2 Honor or opposing counsel's interested in the citations.

3 But, it's our position that the filing of the  
4 bankruptcy Petition did not stay the proceedings in the State  
5 Court, but to be candid, to be efficient we decided rather  
6 than make that argument to Justice Yates, we would make the  
7 argument here because we have larger issues with this  
8 bankruptcy.

9 THE COURT: Right, okay.

10 MS. PATTERSON: It is our position that this case  
11 should be remanded or the Court, in the alternative, should  
12 exercise mandatory extension.

13 As to remand -- I'll address that first -- Debtor  
14 doesn't really dispute our arguments in any meaningful way.  
15 Instead it creates out of thin air some argument that somehow  
16 there are bankruptcy issues involved in this case and they  
17 make reference to claims resolutions and offset.

18 This is not a case that came up by reference to an  
19 objection to claim, for example. This is a pretty plain  
20 vanilla State Court action alleging two counts: tortious  
21 interference and breach of contract. When you look at all  
22 the remand factors, there is absolutely no reason to clog up  
23 this Court, to force my clients to essentially refile their  
24 motions to dismiss for this Court to have to hear those  
25 motions when the State Court is more than ready, willing, and

1 able to resolve these issues.

2           There's a particularly good case for remand here  
3 when there are lots of other State Court proceedings  
4 involving this property and the State Court has an expertise  
5 in real property law in New York and this Court should look  
6 to considerations of comity.

7           Turning to mandatory abstention, the key issue  
8 seems to be, from reading the papers as I see it, is whether  
9 this case -- the State Court case is or is not core. It is  
10 not core. The Debtor's cases to the contrary can be easily  
11 distinguished. They rely, for example, on the *U.S. Lines*  
12 case. *U.S. Lines* involved a declaratory judgment action  
13 involving a comprehensive insurance scheme. *U.S. Lines* under  
14 the insurance policies had to actually pay out funds before  
15 it could make claim. It didn't want to do that as part of  
16 its bankruptcy until it had a declaratory judgment as to what  
17 the insurers would do.

18           Similarly, *Best Products* which the Debtor cited,  
19 that involved a subordination agreement that had to be  
20 adjudicated in order to complete a plan of reorganization.  
21 *Petri* involved a dispute not simply of tortious interference  
22 or contract under State law, but over rights created under a  
23 sales order that the Bankruptcy Court had entered.

24           If you look to the *McKinley* case in the 2nd  
25 Circuit, as it phrased it in actually considering the *U.S.*

1 *Lines* precedent, it said that one of key considerations is  
2 whether the proceeding that sought to be -- that the court  
3 should abstain from, can exist independently of the  
4 bankruptcy case.

5           This State Court action absolutely exists  
6 independent of the bankruptcy case. It was filed before the  
7 bankruptcy. Now, the Debtor seems to argue that, well,  
8 because it's the major asset of the estate, therefore that  
9 somehow makes it core, that simply isn't true. *Briar Patch*  
10 has told us that simply because there is an asset of the  
11 estate that is litigated in another court, that doesn't mean  
12 that it has to be brought within the Bankruptcy Court.

13           I finally address the issue of timeliness. The  
14 Debtor claims that this Court could adjudicate the case much  
15 more quickly than the State Court. First of all, everything  
16 would have to be refiled in this Court, where we had already  
17 progressed in the State Court to an oral argument on motions  
18 to dismiss.

19           And, the Debtor put in its papers some statistic  
20 as to the State Court -- the time it takes to adjudicate a  
21 breach of contract action. I point out: one, that's an  
22 average, and two, that statistic, Your Honor, was from 1998.  
23 So, average statistics as to the speed of the State Court  
24 commercial par in 1998 really don't address this situation  
25 where we have a case that's new to this Court, doesn't belong

1 in this Court, and that had already had oral argument in the  
2 State Court.

3 So, we submit that Your Honor should either remand  
4 or exercise mandatory abstention.

5 THE COURT: All right, thank you.

6 MS. PATTERSON: Thank you.

7 THE COURT: Mr. Sasloff, why don't I hear you in  
8 response?

9 MR. SASLOFF: Thank you, Your Honor. I'll be  
10 brief.

11 THE COURT: Okay.

12 MR. SASLOFF: We stand on the papers we did  
13 submit. We do not believe that the action has had much  
14 progress. All that's happened is there was a complaint filed  
15 and two motions. The Debtor had, under the State Court  
16 Judge's ruling, until September 13th to file responsive  
17 papers. This case was filed on September 2nd. That's why  
18 those response papers weren't filed.

19 We do believe that the case does bear in mind the  
20 *U.S. Lines* case in the sense that the resolution of this case  
21 will have a direct bearing on the Debtor's reorganization  
22 case one way or the other and we believe that this Court is  
23 very familiar with the New York laws, contract laws, property  
24 laws, and is as capable as any other court to deal with those  
25 issues.

1           We do believe that, no matter the statistics or  
2 not, we believe that we could more speedily come to  
3 resolution in this Court with regard to the underlying claims  
4 and we do believe that the removal was timely, it was  
5 appropriate, and we're prepared to move forward on it.

6           At this juncture, because the lease issue is off  
7 to a different side, this claim is going to be or would be  
8 the centerpiece of the remaining reorganization case and we  
9 ask for the Court not to remand.

10           We think that because it is the centerpiece of  
11 what would remain as the Chapter 11 case, let the Court  
12 obviously hear the case. And for the matter -- all the  
13 matters have to be refiled before this Court, it's simply --  
14 the complaint's already been filed. It's just two motions  
15 for dismiss, whatever exhibits were attached to those  
16 motions, the preliminary opposition that the Debtor's pre-  
17 petition counsel had filed at the appropriate time.

18           I mean, they haven't even answered the removal  
19 action as part of this case yet, so it's like, I don't think  
20 the case is far along in any regard and had the Debtor  
21 brought that case before this Court after the filing of the  
22 bankruptcy case, I think this Court would clearly have heard  
23 that case.

24           So, the happenstance of the timing of the case,  
25 you know, shouldn't be material necessarily to whether or not

1 we should be able to go forward with that case.

2 THE COURT: All right, thank you. All right,  
3 anything else? All right, I've read all the papers and given  
4 this issue a fair amount of thought and my ruling is that I'm  
5 going to direct that the case is remanded under 1452(b). I  
6 have discretion to order the remand on any number of grounds.  
7 I think that the status of the case in the State Court based  
8 on the representations of counsel that there was a ruling  
9 imminent and also based on notwithstanding counsel's argument  
10 which I believe I understand the argument that this has a  
11 nexus to a potential reorganization.

12 But, on the whole and balancing the arguments on  
13 both sides, this is uniquely a State Court action involving  
14 the rights and remedies that these parties have against each  
15 other with respect to the alleged tortious interference with  
16 the lease and with the Urban Outfitters relationship and that  
17 I think, on balance, this would best be litigated in the  
18 State Court. So, I'm going to ask that an order be submitted  
19 in that regard.

20 I'm going to continue the rest of the case until  
21 after the first of the year to -- as long as, and it does  
22 appear that the Debtor is continuing to comply with my order  
23 allowing access and that there's no immediate detriment or  
24 harm to the building, I'm inclined at this juncture to let  
25 the warrant process continue a little further.

1 I have to say though that with respect to the  
2 interesting issue of what my -- the extent of my jurisdiction  
3 under 365(d)(3) and the issues that I've raised with respect  
4 to 365(d)(4), I think we're going to have to talk about that  
5 another day.

6 And I don't view -- I think that I have  
7 jurisdiction and wide berth on those issues and what I mean,  
8 just to put a fine point on it, is that if what Ms. Daley is  
9 saying comes to pass; in other words, that a warrant is  
10 issued and that there continues to be further appeals on the  
11 State side and that there is no payment of rent and again, I  
12 don't know why the Debtor would pay rent now because we're  
13 just in this interesting loop, I may well exercise what I  
14 believe would be my authority to direct the surrender of the  
15 premises.

16 So, time will tell, but at this point, I'm going  
17 to send the litigation back to State Court and give you folks  
18 a date. Ms. Daley, when would you like to come back in? I  
19 think January 5th, which is a date I've been giving out, is  
20 probably a little too early.

21 MS. DALEY: Your Honor, I would tend to agree. If  
22 we're coming back in and we're to do another status on this  
23 to determining what the position is with regard to the  
24 warrant --

25 THE COURT: Right.

1 MS. DALEY: -- I would suggest that we come in a  
2 little bit later than that. As far as the motion to dismiss  
3 for bad faith filing, I would imagine that at that point, the  
4 Court would determine --

5 THE COURT: At a certain point, I'll --

6 MS. DALEY: -- a hearing date.

7 THE COURT: Right, at a certain point, I'll look  
8 at that again, but if you may recall when we had a discussion  
9 last time, for the moment, I had determined that I didn't  
10 want to rule on that. So, we've got a lot of moving parts  
11 now. I think the Debtor's going to have to assess what it's  
12 going to do going forward in light of the remanded  
13 litigation.

14 So, we'll carry the motion to dismiss and we'll  
15 carry the open issue on the warrant and the surrender until  
16 the next hearing date.

17 MS. DALEY: And what about with regard to the --  
18 whether or not the lease in fact terminated --

19 THE COURT: Same. I mean, it's all --

20 MS. DALEY: Part and parcel.

21 THE COURT: -- it's all part and parcel, exactly.  
22 All right, so what --

23 MS. DALEY: I would suggest then, Your Honor, if  
24 we're not going to -- if it would be just to come back in and  
25 not continue with the hearing on that specific date --

1 THE COURT: Do you want to send in a status letter  
2 instead of having everybody come in?

3 MR. SASLOFF: I think we probably need to do both.  
4 I mean, I would like not to have to come in to report to the  
5 Court that nothing's happened, but we do have, you know, the  
6 initial case conferences regularly adjourned by this Court.  
7 I would suggest maybe we adjourn that out further and then  
8 just set a date --

9 THE COURT: Why don't I just give you a date and  
10 if there's a reason to get on the phone beforehand or to  
11 adjourn it out, we'll just do that, so let's pick a date  
12 while I have you all here. You want to come in on January  
13 19th? Does that work, Mr. Sasloff?

14 MR. SASLOFF: Yes, Your Honor.

15 MS. DALEY: We have the 19th or the 20th or the  
16 18th.

17 MR. SASLOFF: Actually, the 19th I do have another  
18 matter in front of Judge Gropper on that day that will  
19 probably also be hotly contested.

20 MS. DALEY: What about the 18th?

21 THE COURT: Do you want to do the --

22 MS. DALEY: Can we do the 18th?

23 THE COURT: The 18th?

24 MR. SASLOFF: That's fine, Your Honor.

25 THE COURT: All right, the 18th at 10:00. All

1 right, happy holidays, folks.

2 MS. DALEY: Thank you, Your Honor.

3 THE COURT: You'll get an order to me on the  
4 remand?

5 MS. DALEY: Absolutely, Your Honor.

6 THE COURT: Email is fine if that works for you.  
7 All right, thank you.

8 (Time noted: 11:08 a.m.)

9 \* \* \* \* \*

10

11 CERTIFICATE

12 I, RANDEL RAISON, certify that the foregoing is a  
13 correct transcript from the official electronic sound  
14 recording of the proceedings in the above-entitled matter, to  
15 the best of my ability.

16 *Randel Raison*

17 \_\_\_\_\_

July 18, 2011

18 Randel Raison

19

20

21

22

23

24

25